Supreme Court, U.S.
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No. 95-895

In The

Supreme Court of the United States

October Term, 1995

DANIEL C. MILLER,

Petitioner,

vs.

DONALD L. DeMUTH,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER ISSUES ARE PROPERLY PRESERVED FOR REVIEW BY THE COURT WHEN THEY WERE NEVER PRESENTED AT TRIAL, AND WHERE THE TRIAL COURT SPECIFICALLY REFUSED TO MAKE A DECISION CONCERNING THOSE ISSUES ON THE MERITS.

II. WHETHER A TRIAL COURT'S ENFORCEMENT OF A LEGAL CONTRACT BETWEEN PRIVATE PARTIES, WHICH ENTITLES THE PARTIES TO TAKE ACTIONS WHICH ARE PERMITTED BUT NOT COMPELLED BY LAW, CONSTITUTES STATE ACTION IN THE CONSTITUTIONAL SENSE.

III. WHETHER A TRIAL COURT'S ACTIONS, EVEN IF CONSIDERED STATE ACTION IN THE CONSTITUTIONAL SENSE, IN RESOLVING AN ECONOMIC DISPUTE THROUGH ITS ENFORCEMENT OF A LEGAL NON-COMPETE CLAUSE AFTER A PRIVATE EMPLOYEE HAS BEEN TERMINATED VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Donald L. DeMuth ("DeMuth") owns and operates a professional management and consulting firm which provides accounting and financial advice and consulting services to healthcare professionals. In 1985 DeMuth employed Petitioner Daniel C. Miller ("Miller"), a certified public accountant, to perform professional services for DeMuth's practice. Miller's employment was pursuant to an employment agreement which allowed for his termination for cause and which defined cause to include, among other things, homosexuality.

The employment agreement contained a non-compete clause.[1] The terms of the employment agreement required Miller to pay a specified sum if and when he left the firm or was terminated for cause and within five

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[1] The non-compete clause provides: If within five years of the termination of this Agreement if the Employee terminates the Agreement or the Employer terminates the agreement for cause, and the Employee establishes a professional management consulting or accounting firm within a 50-mile radius of any of Employer's current or former clients, he agrees to pay the Employer 125 percent of the previous twelve months' charges for each of the Employer's clients who retain his professional management consulting or accounting services. Cause shall include, but is not limited to, moral turpitude, being charged with a felony, use of illicit drugs, intoxication while working, insulting Employer's family and clients, not working, intentionally working slowly, intentionally losing clients, engaging in sexual activities in the office, and homosexuality.

years thereafter Miller took clients from DeMuth's practice. The sum Miller agreed to pay was dependent upon the number of clients taken.

In October of 1990, DeMuth learned, for the first time, that Miller was, in violation of his employment agreement, a homosexual. At that point, DeMuth terminated Miller's employment pursuant to the terms of the employment agreement. Within seven days of his termination, Miller solicited clients of DeMuth's practice for a professional management and accounting practice he opened on his own. As a result of those solications, Miller, in violation of the agreement, appropriated DeMuth's clients which represented approximately 20 percent of DeMuth's annual revenue. DeMuth demanded payment from Miller pursuant to the terms of the non-compete clause and when Miller refused suit was commenced.

At the conclusion of a 3-day jury trial, the trial court found that due to Miller's breach of the non-compete clause DeMuth was entitled to $110,000.00 in damages. Post-trial motions were denied and an appeal to the Pennsylvania Superior Court followed.

In his appeal to the Pennsylvania Superior Court, Miller raised, for the first time, the legal arguments concerning state action and equal protection which he now seeks to have the Court review. The Pennsylvania Superior Court found, as a matter of fact, that:

> [Miller's] constitutional arguments appear for the first time in Appellant's brief. An examination of the pleadings, pre-trial memoranda, arguments before trial, and at the compulsory

> non-suit and direct verdict stages of the case, as well as post-trial motions, are devoid of any mention of the constitutional grounds offered in the Appellant's brief as justification for entry of judgment notwithstanding the verdict or a new trial. This lack of presentment of such a theory for relief would normally be fatal to preservation of such grounds on appeal. *Petitioner's Appendix, Page 13a.*

The Pennsylvania Superior Court, nevertheless, as a matter of law, went on to hold that this case constituted an exception to the principle that appellate courts will address only issues properly preserved at trial and that the constitutional issues were preserved for appellate review.[2]

The Pennsylvania Superior Court affirmed the judgment of the trial court. Miller petitioned the Pennsylvania Supreme Court for allowance of appeal; that petition was denied. Miller has filed a Petition for Writ of Certiorari to the Superior Court of Pennsylvania with this Court. DeMuth now files Respondent's Brief in Opposition to Miller's Petition for Writ of Certiorari.

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[2] DeMuth filed a Cross-Petition for Allowance of Appeal with the Pennsylvania Supreme Court challenging the Superior Court's consideration of issues on appeal that were never presented at trial. When Miller's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied, DeMuth's Cross-Petition for Allowance of Appeal was also denied.

REASONS FOR DENYING THE WRIT

I. THE ISSUES CONCERNING STATE ACTION AND EQUAL PROTECTION WHICH MILLER NOW SEEKS TO HAVE THE COURT REVIEW WERE NOT PRESENTED TO THE TRIAL COURT.

Miller's Petition for Writ of Certiorari does not comply with this Court's rules. Rule 14(G)(i)[3] of the Rules of the Supreme Court of the United States requires that a petitioner's statement of the case contain specific references as to when, where, and the manner in which, both in the trial court and in the appellate courts, the federal questions sought to be reviewed were raised and resolved. Miller made no attempt to comply with the Rule in his Writ of Certiorari. The reason for this failure is simple, Miller never presented to the trial court the issues concerning state action and equal protection which he now seeks to have the Court review.

The Court has long held that it will not ordinarily decide issues neither raised nor considered by the lower

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[3] Rule 14(G)(i) states in pertinent part:

(i). If a review of a state-court judgment is sought, specification of the stage and the proceeding, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . , so as to show the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. . . .

courts. *Tennessee vs. Dunlap*, 426 U.S. 312, 316 (1976); *Youakim vs. Miller*, 425 U.S. 231, 234 (1976). The Court has also determined that when presented with questions of state law it must apply that law in accordance with the then-controlling decisions of the state's highest court. *Vandenbark vs. Owens Illinois Glass Co.*, 311 U.S. 538, 543 (1941).

A fundamental principle of Pennsylvania appellate law is that appellate courts will address only issues properly preserved at trial or prior to trial. *Jackson vs. Phillips*, 502 Pa. 326, 466 A.2d 130 (1983). The Pennsylvania Supreme Court has repeatedly reemphasized that in order to serve judicial economy, give the trial court a full opportunity to do its job properly, and avoid unfair advantage to an unprepared litigant, issues must be properly preserved at trial to be considered on appeal. *Dilliplaine vs. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114, 116 (1974). Moreover, the litigant must preserve the specific point he wishes to address in appellate review by first raising it in the lower court with sufficient specificity to provide the trial court with the opportunity to consider the merits of such an argument and reach specific conclusions. *Commonwealth vs. Stein*, 487 Pa. 539, 406 A.2d 1381 (1979); *Weir by Gasper vs. Estate of Ciao*, 521 Pa. 491, 556 A.2d 819, 825 (1989). In *Weir* the Pennsylvania Supreme Court also specifically held that when issues are not raised in post-trial motions, raising them in a brief in support of those motions does not preserve them for appeal. *Id.*

In this action the constitutional arguments concerning whether or not court enforcement of the non-compete clause constituted state action in the constitutional sense and whether, if considered state action, those actions in turn violated equal protection standards were never

raised at trial. Even after trial, Miller failed to raise these constitutional issues in his post-trial motions.[4] Miller raised these arguments, for the first time in the brief he filed in support of his post-trial motions.[5]

When DeMuth pointed out to the Pennsylvania Superior Court that the issues concerning state action and equal protection had not been presented to the trial court, Miller responded by submitting a reply brief to the Pennsylvania Superior Court. In that reply brief Miller drew the Superior Court's attention to some very general statements Miller made in the trial court record concerning alleged violations of public policy. These statements were made in the context of a counterclaim made by Miller against DeMuth at trial based upon Pennsylvania tort law which required a showing that a termination of employment violated public policy.[6]

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[4] As the Pennsylvania Superior Court stated: "Miller's post-trial motions are devoid of any mention of the constitutional grounds offered in the appellant's appellate brief . . . " *Petitioner's Appendix, Page 13a.*

[5] The nature of Miller's arguments changed when he changed counsel. His trial counsel never raised any of the constitutional issues which he now seeks to have this Court review. The entire legal focus of this case changed dramatically with the entry of Miller's present counsel, the LAMBDA Legal Defense and Education Fund, Inc., into the case after post-trial motions had been filed. Miller's present counsel ignored the trial counsel's failure to raise these issues and simply inserted those legal arguments in the brief she filed in support of Miller's post-trial motions.

[6] The trial court found no liability against DeMuth on the basis of Miller's counterclaim and Miller did not pursue this issue on appeal.

These general statements raised in the context of state tort law were totally unrelated to Miller's later constitutional challenges to the trial court's enforcement of the contract between the parties.

After being presented with these arguments and carefully reviewing the record, the Pennsylvania Superior Court correctly found, as a matter of fact, that the constitutional arguments, which Miller now seeks to have the Court review, were never presented either prior to or during trial. The Pennsylvania Superior Court, after making this factual determination, however, went on to state that:

> This lack of presentment of such a theory for relief would normally be fatal to preservation of such grounds on appeal. However, the trial court addressed the constitutional challenges in its opinion. The reason for and timing of such a response by the trial court was a result of '[t]hose arguments [being] first made when Miller filed his brief in support of the post-trial motions, which occurred after he changed counsel. . . . ' The trial court having exercised its discretion responding to the constitutional issues raised in the Defendant's post-trial brief and at oral argument preserves such claims for appellate review. See *Thatcher's Drugs of West Goshen, Inc. vs. Consolidated Supermarkets, Inc.*, 391 Pa. Super. 525, 571 A.2d 490, 494 (1990) reversed on other grounds, 535 Pa. 469, 636 A.2d 156 (1994). . . . *Petitioner's Appendix, Pages 13a-14a.*

When Miller filed his Petition for Allowance of Appeal to the Pennsylvania Supreme Court, DeMuth filed a Cross Petition for Allowance of Appeal to the Pennsylvania Supreme Court asserting that the Pennsylvania Superior Court's reliance upon *Thatcher's Drugs of West Goshen, Inc.*

vs. Consolidated Supermarkets, Inc., supra, and related cases constituted legal error.

Cases relied upon by the Pennsylvania Superior Court in its decision to review Miller's constitutional arguments involved actions where issues were fully presented to the trial court though in a procedurally flawed manner and the trial court then took the opportunity, despite the procedural defects, to review the specific issues involved and to make specific determinations of those issues on the merits. That is not what occurred in this case.

The trial court did mention the constitutional arguments raised in Miller's brief. The Pennsylvania Superior Court characterized the trial court's brief mention of Miller's arguments as finding "meritless the specific arguments raised". *Petitioner's Appendix, Page 16a.* A review of the trial court's opinion cited by the Pennsylvania Superior Court, however, shows that the trial court never discussed, let alone reached any conclusions concerning, the specific arguments which Miller now seeks to have the Court review. The trial court's language, seen in context, far from discussing and making a reasoned determination on the merits of the issues raised, simply states why the trial court concluded that it was not in a position to make any determination on the merits and that therefore any detailed consideration of the constitutional issues would be pointless. The trial court stated:

> We could continue our analysis of various cases dealing with *similar equal protection claims.* See, e.g., *Stephen vs. Aspin,* ___ F.3d ___, 1993, W.L. 465530 (D.C. Circuit), *Jantz vs. Muci,* 976 F.2d 623 (1992). We are satisfied, however, that

> this would be to no end. These cases each deal carefully with the state of *a factual record adduced in the context of a federal claim*. In this case, there was no factual record made with respect to the due process or public policy claim apart from the contractual aspect of the lawsuit. *Petitioner's Appendix, Page 54a*. (Emphasis added)

Thus, rather than making a determination of Miller's constitutional arguments on the merits, the trial court correctly declined to do so after it determined that it had never been presented with these arguments or with a factual record to apply to the fact specific case law involved. *Id*. Nowhere in the trial court record was there any mention of, much less any competent evidence supporting, Miller's later claims regarding state action or equal protection.

Only if a trial court fully addresses and makes a determination on the merits of a specific issue is that issue properly preserved for appeal. *Commonwealth vs. Metz*, 534 Pa. 341, 633 A.2d 125 (1993), *Kurtis vs. Kurtis*, 521 Pa. 105, 555 A.2d 804, 806 (1989). In this action the issues which Miller now seeks to have the Court review were never presented at trial or in post-trial motions and the trial court specifically refused to make a decision concerning those issues on the merits. Miller had every opportunity at trial to make the specific arguments that the trial court's enforcement of the agreement would constitute state action in the constitutional sense, that such action violated equal protection and to support those assertions with factual evidence and legal authority, that never occurred. For this reason alone Miller's Petition for Certiorari should be denied.

II. THE TRIAL COURT'S ENFORCEMENT OF A LEGAL CONTRACT BETWEEN PRIVATE PARTIES, WHICH ENTITLES THE PARTIES TO TAKE ACTIONS WHICH ARE PERMITTED BUT NOT COMPELLED BY LAW, DOES NOT CONSTITUTE STATE ACTION IN THE CONSTITUTIONAL SENSE.

The real question presented here is whether the enforcement of a legal agreement between private parties constitutes state action in the constitutional sense. That issue has been well settled by this Court's decisions and was correctly decided by the lower courts.

Throughout this action Miller has never challenged DeMuth's termination of his employment, which Miller concedes to be a private act.[7]

Miller's Petition for Writ of Certiorari to the Court states:

> DeMuth's firing of Miller was a private act of prejudice, which he was able to accomplish with no state involvement. The Court is not asked to hold in this case that private employers

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[7] "The contract at issue permitted Miller to be fired because he is gay, which Miller concedes is a private act. . . . " *Brief for Appellant submitted to the Superior Court, Page 10.* "As a private employer, DeMuth is not presently prohibited from acting upon his personal prejudice to disadvantage Miller by firing him because of his sexual orientation; . . . " *Appellant's Reply Brief submitted to the Superior Court, Page 1.* "Miller does not challenge those acts of discrimination which DeMuth accomplished without the Commonwealth's assistance, for this reason no effort is made here to reverse DeMuth's dismissal of Miller. . . . " *Miller's Petition For Allowance of Appeal to the Pennsylvania Supreme Court, Page 12.*

> ungoverned by relevant civil rights laws are barred from firing employees based upon their sexual orientation or any other reason. *Miller's Petition for Writ of Certiorari to the Superior Court of Pennsylvania, Page 3.*

The state action Miller claims to be involved in this matter concerns solely the trial court's enforcement of the non-compete clause. Miller in his Petition for Writ of Certiorari assumes, rather than attempting to establish with legal argument, that these actions by the trial court constitute state action in the constitutional sense. To the extent that Miller does try to support this contention he does so by citing *Shelley vs. Kraemer*, 334 U.S. 1 (1948). In rejecting this contention Judge Olszewski, in his well reasoned concurrence for the Pennsylvania Superior Court, reviewed a series of decisions from this Court, the Third Circuit Court of Appeals and the Pennsylvania Supreme Court. After reviewing those cases, Judge Olszewski determined that the case law has consistently held "that judicial enforcement of a contract cannot convert what would otherwise be a private matter into state action." *Petitioner's Appendix, Page 29a.* Nothing in Miller's petition challenges or even calls into question this principle of law.

The Court has long recognized that the Fourteenth Amendment, which prohibits states from denying parties their federal constitutional rights, applies to acts of the states, not to acts of private persons or entities. "If the action of a respondent is not state action our inquiry ends." *Rendell-Baker vs. Kohn*, 457 U.S. 830, 837-838 (1982); *Adickes vs. S.H. Kress & Co.*, 298 U.S. 144, 169 (1970). See also *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

There are situations where private action may be deemed to be "state action" for purposes of the Fourteenth Amendment. Our courts have identified three general categories of such cases:

> (1) Where state courts enforce an agreement affecting private parties; (2) where the state significantly involved itself with a private party; and (3) where there was private performance of a government function.
>
> For state action purposes, it is important to distinguish between the following two types of cases [when state court enforcement of an agreement affecting private parties does not and does constitute state action respectively]: (1) cases in which state courts enforced the rights of private persons to take actions which are permitted but not compelled by a law and (2) cases in which state courts enforced laws which require or forbid certain actions to be taken. *Parks vs. 'Mr. Ford'*, 556 F.2d 132 at 135, 136, Footnote 6a (3rd Cir. 1977).

The Court has drawn a distinction in determining whether or not state action has occurred, based upon whether or not the state permits but does not compel action.

> [A] state is responsible for the discriminatory act of a private party when the state, by its law, has compelled the act. When the state has commanded a particular result, it has saved to itself the power to determine that result and thereby to a significant extent has become involved in it. *Adickes, supra,* at 298 U.S. 170.

"Our cases state 'that a state is responsible for the . . . act of a private party when the state by its laws has compelled the act'." *Flag Bros., Inc. vs. Brooks*, 436 U.S. 149, 164 (1978). However, the state is in no way responsible for decisions of a private party which the state permits but does not compel. *Id.* at 165. "[The] state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." *Rendell-Baker vs. Kohn, supra*, at 457 U.S. 840. "Constitutional standards are invoked only when it can be said that the state is responsible for the specific conduct of which the plaintiff complains." *Blum vs. Yaretski*, 457 U.S. 991, 1004 (1982). Where a private actor has the choice to take whatever action it so desires, "[such actor's] exercise of the choice allowed by state law where the initiative comes from it and not from the state does not make its action in doing so 'state action' for purposes of the 14th Amendment." *Jackson vs. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974).

Other courts, when faced with the situation presented here, court enforcement of a legal agreement between private parties, have ruled to the same effect, most recently:

> [W]e follow other courts which have indicated that where a court acts to enforce the right of a private party which is permitted but not compelled by law, there is no state action for constitutional purposes in the absence of a finding that constitutionally impermissible discrimination is involved. *United Egg Producers vs.*

Standard Brands, Inc., 44 F.3d 940, 943 (11th Cir. 1995).[8]

In this action the trial court was simply enforcing the right of a private person, DeMuth, to take actions which are permitted but not compelled by the law. The parties voluntarily entered into an agreement that required Miller to pay DeMuth for any of DeMuth's clients with whom Miller did business after he left DeMuth's employment. It was that contract right that DeMuth asked the trial court to enforce. Nothing in state law compelled DeMuth to enforce his private contract with Miller. DeMuth's actions, and the remedy which he sought from the trial court, were not compelled by the law, but merely permitted by it. As such, those actions by DeMuth are not "state action" in the constitutional sense.

Miller in his petition for certiorari attempts to create the impression of conflict and confusion within the law, where none, in fact, exists, by citing cases which were decided in the context of not the first category of cases, concerning state court enforcement of an agreement affecting private parties, but the third category of cases concerning the private performance of a government

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[8] The Court in *United Egg Producers vs. Standard Brands, Inc., supra*, after citing *Cable Invest, Inc. vs. Woolley*, 680 F.Supp. 174, 177 (M.D. PA. 1987); *Gresham Park Community Organization vs. Howell*, 652 F.2d 1227, 1239 (5th Cir. 1981); *Schreiner vs. McKenzie Tank Lines & Risk Management Services, Inc.*, 408 So.2d 711, 719 (Fla. Dist. Ct. App. 1982) went on to state that: "*If* for constitutional purposes, *every private right were transformed into governmental action by the mere fact of court enforcement of it, the distinction between private and governmental action were to be obliterated. Edwards vs. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968)." *Id.* at 943 (emphasis added).

function pursuant to state statute. Miller suggests that these cases establish that the mechanisms of judgment enforcement are state action. That is not what the cases say and that is not the law.

The cases cited by Miller all involve attacks upon state statutes which allowed a party to perform a government function to seize assets, ex parte and prior to a judgment being entered. For example, *Lugar vs. Edmondson Oil Co.*, 457 U.S. 922 (1982), concerned attachment of property pursuant to a Virginia statute which allowed such actions before judgment was entered. In that case the Court found that the petitioner was challenging the state statute as procedurally defective under the Fourteenth Amendment. *Id.* at 457 U.S. 941.[9] The Court in *Lugar* went on to conclude that state-created attachment procedures will make a private party a "state actor" for purposes of the Fourteenth Amendment "when the state has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute." *Lugar vs. Edmondson Oil Co., Inc., supra,* at 457 U.S. 941, 942.[10]

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[9] See also *North Georgia Finishing Co. vs. Di-Chem, Inc.*, 419 U.S. 601 (1975) concerning a Georgia garnishment statute which permitted garnishment to be issued while litigation was pending and also *Jordan vs. Fox*, 20 F.3d 1250 (3rd Cir. 1994) concerning Pennsylvania execution and attachment statutes after judgment had been entered by confession. *Sniadach vs. Family Finance Corp.*, 395 U.S. 337 (1969), a case involving review of a Wisconsin pre-judgment garnishment statute.

[10] The Court also stated in *Lugar*: "As a matter of substantive constitutional law, the state action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by

That concept as well as the cases cited by Miller concerning it have no application to this case. This is not a case where DeMuth acting unilaterally sought to perform a government function pursuant to state statutes. This is simply a case concerning court enforcement, after full hearing and jury trial, of a legal agreement between private parties. Miller cites only *Shelley* to suggest that such action by a trial court should be considered state action in the constitutional sense. However, the Court in *Shelley* was not presented with the circumstances found here.

We will not attempt here to repeat in detail Judge Olszewski's excellent analysis of how *Shelley* and its progeny are factually distinguishable from the situation presented here. See *Petitioner's Appendix Pages 26a-31a.*

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governments'. In 1883, this Court in the *Civil Rights Cases,* affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the state, subject to scrutiny under its provisions, and private conduct 'however discriminatory or wrongful' against which the Fourteenth Amendment offers no shield.

Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is a good or bad policy, it is fundamental fact of our political order." *Lugar vs. Edmondson Oil Co., Inc., supra,* at 936, 937. (Citations omitted).

Judge Olszewski, in reaching his decision, pointed out that, unlike *Shelley*:

> . . . the actual contract at issue here does not seek to directly penalize Miller for his sexual preference. Rather, it seeks to directly penalize Miller for his business competition with DeMuth in violation of Miller's written promise not to compete. . . . DeMuth's suit for damages based on the covenant not to compete does not require any court involvement at all in the alleged discrimination. . . . This Court need only enforce Miller's promise not to compete with DeMuth if he were to quit or be fired for cause. By enforcing this promise, we are not expressing approval of the reasons for Miller's termination. *We are simply saying that Miller, like anyone else, homosexual or heterosexual, must abide by his own written promise not to compete with his ex-employer for a certain number of years. Petitioner's Appendix, Pages 28a, 29a, and 31a* (emphasis added).

In addition to the factual distinctions, the legal situation presented in *Shelley* and its progeny is very different from the situation presented here. The Court has long recognized that:

> The obligation of a contract is 'the law which binds the parties to perform their agreement'. A contract depends on a regime of common and statutory law for its effectiveness and enforcement. 'Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its

> enforcement or discharge.' *Norfolk & Western vs. A.M. Train Dispatchers*, 499 U.S. 117, 129-130 (1991) (citations omitted).

In *Shelley* the Court was not faced with enforcing an agreement between two private parties which were permitted but not compelled by law. Instead, as the Court in *Shelley* specifically noted, it was faced with enforcement of an agreement which clearly violated existing statutory law. *Shelley vs. Kraemer*, 334 U.S. 1, 11 (1948).

The Court in *Shelley* referred to a number of existing civil rights statutes.[11] The Court specifically quoted the Civil Rights Act of 1866 which provides:

> All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. *Shelley vs. Kraemer, supra*, at 334 U.S. 11.

Here, unlike *Shelley*, there is no existing constitutional provision, federal law, state statute, or local ordinance precluding enforcement of the agreement entered into by DeMuth and Miller. In the absence of such laws properly enacted by the appropriate legislative body DeMuth is free, but not required, to seek enforcement of the agreement entered into.

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[11] 42 U.S.C. Section 1982, deriving from 14 Stat. 27 Section 1 (1866), the first in a series of federal civil rights statutes. Also 42 U.S.C. Section 1981, deriving from 16 Stat. 144 Section 16 (1870), which provided that "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as . . . white citizens."

This is not a case where one party, unilaterally, before judgment was entered, sought to perform government functions pursuant to state statute. This is not a case where a trial court was asked to enforce any discriminatory actions at all, let alone discriminatory actions which violated existing statutes. This is simply a case of court enforcement, after a jury trial, of a legal agreement between private parties. This Court's decisions, and the decisions consistently made by other courts faced with the circumstances presented here, establish that such actions by a trial court do not constitute state action in the constitutional sense. Accordingly, Miller's Petition for Writ of Certiorari must be denied.

III. THE TRIAL COURT'S ACTIONS, EVEN IF CONSIDERED STATE ACTION IN THE CONSTITUTIONAL SENSE, IN RESOLVING AN ECONOMIC DISPUTE THROUGH ITS ENFORCEMENT OF A LEGAL NON-COMPETE CLAUSE AFTER A PRIVATE EMPLOYEE HAS BEEN TERMINATED, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

Despite Miller's assertions to the contrary, this action does not involve state action premised on anti-gay bias. That issue is not presented by the facts in this case. In this case the trial court decided an economic dispute between the parties.

As recognized by the Pennsylvania Superior Court, the Pennsylvania Supreme Court, and Miller himself, (see Footnote 7 above), there was no court involvement in Miller's termination, which was an accomplished and

unchallenged fact prior to the initiation of litigation. For purposes of the trial court's involvement it would not have mattered if Miller had been terminated for a cause completely unrelated to his sexual preference or indeed had left the practice on his own; Miller would still be required, as noted by the Pennsylvania Superior Court: " . . . like anyone else, homosexual or heterosexual, [to] abide by his own written promise not to compete with his ex-employer for a certain number of years." *Petitioner's Appendix, Page 31a.* The trial court's action in enforcing the non-compete clause was not dependent upon Miller's sexual preference. Miller's homosexuality was incidental to this contract action in which the trial court was merely called upon to enforce the terms of the agreement voluntarily entered into by the parties.

Throughout this action Miller has repeatedly conceded that there was no court involvement in Miller's termination by DeMuth. These private actions were not challenged (see Footnote 7). Despite Miller's recognition of this fact, he suggests in his *Petition for Writ of Certiorari* that DeMuth's private actions in terminating Miller somehow involved government classifications. That is not what occurred here and is false as a matter of fact. Miller also suggests that DeMuth's actions must have a rational basis. That is simply not the law nor should it be. Private employers, unlike public employers, encounter no restrictions under the Fourteenth Amendment. *Hazelwood School District vs. United States,* 433 U.S. 299, 309 (1977). Again, in an attempt to create the illusion of conflict and confusion where there is none, Miller in his petition cites a number of cases involving public employment which

have absolutely no applicability or relevance to the situation presented here.[12]

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[12] See *Doe vs. Casey*, 796 F.2d 1508 (D.C. Cir. 1986) (a case involving public employment of an individual by the Central Intelligence Agency); *Padula vs. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (a case involving a homosexual applicant who attempts to join the Federal Bureau of Investigation); *Jantz vs. Muci*, 976 F.2d 623 (10th Cir. 1992); *Acanfora vs. Board of Education of Montgomery County, et al.*, 491 F.2d 498 (1974); *Rowland vs. Mad River Local School District*, 470 U.S. 1009 (1985); all involving public employment of school teachers. See also *Singer vs. United States Civil Service Commission*, 530 F.2d 247 (9th Cir. 1976) (a case involving the discharge of a federal employee). See also *Able et al. vs. United States*, 880 F.Supp. 969 (E.D. N.Y. 1995), appeal docketed 95-6111 (2nd Cir. May 24, 1995); *Hi-Tech Gays vs. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990) as well as a whole series of unpublished defense department cases all involving employment actions with the federal government making decisions as an employer. See also *Shahar vs. Bowers*, 836 F.Supp. 859 (N.D. Ga. 1993) (a case involving termination of a state employee by the Georgia Attorney General). Even in the context of public employment where the state or federal government is the employer making employment decisions courts have been reticent to find a claim for equal protection. In *Singer vs. United States Civil Service Commission, supra*, the court specifically found that the discharge of a federal employee because he was openly and publicly flaunting his homosexuality as a way of life and indicated further continuance of such activities while identifying himself as a member of a federal agency was permissible. *Id.* at 255. In *Shahar vs. Bowers, supra*, the court was faced with a claim involving the public employment by the state of Georgia of an acknowledged lesbian. There the court found that the termination of Miss Shahar by the Attorney General of Georgia, when he became aware of her plans to "get married" to her girlfriend, was legally valid, and did not constitute state action because the Attorney General's decision was not undertaken with an intentionally discriminatory purpose. *Id.* at 867.

It is simply incorrect to suggest that constitutional law requires that actions taken by private individuals have any rational basis. The Court has repeatedly recognized the dichotomy between discriminatory action by the government which is prohibited by the Equal Protection Clause and private conduct "however discriminatory or wrongful against which that clause erects no shield. . . . " *Moose Lodge No. 107 vs. Irvis*, 407 U.S. 163, 172 (1972).[13]

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[13] DeMuth's position throughout this action has been that the cases discussing rational basis review do not concern or relate to the actions of a private individual which are not subject to any review or required to meet any standard. "All that is involved here is the private termination without any court involvement of an individual's private employment; as such those actions are not subject to any sort of government classification or rational basis review." *DeMuth's Brief in Opposition to Petition for Allowance of Appeal to the Pennsylvania Supreme Court, Page 17.* "This case, unlike all of the cases discussed above, does not concern the enactment of state legislatures or the actions of political entities which are subject to judicial review. Therefore, even if courts were to subject government classifications based on sexual preference to some form of heightened judicial review, all that is involved here is the private termination of an individual's private employment. The proper mechanism for government to alter such private behavior is to enact legislation against it. In the absence of such laws, even if courts were to determine that sexual preference was entitled to some form of heightened judicial review, that finding in and of itself would not alter the outcome of this case." *Brief for DeMuth in the Superior Court of Pennsylvania, Page 34.* Miller later abandoned any suggestion in his arguments that sexual orientation is subject to any form of heightened scrutiny. "[The Pennsylvania Superior Court] need not and should not reach the question of whether discrimination based on sexual orientation is subject to any form of heightened scrutiny." *Appellant's Reply Brief, Page 2.*

The Court's cases clearly establish that rational basis review occurs only in the context of government classifications found within statutes or local ordinances.

> In applying [the Equal Protection Clause], this Court has consistently recognized that the 14th Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of a criteria wholly unrelated to the objective of that statute. A classification 'must be reasonably, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Reed vs. Reed*, 404 U.S. 71, 75-76 (1971) (citations omitted).

"The general rule is that *legislation* is presumed to be valid and will be sustained if the *classifications drawn by the statute* is rationally related to a legitimate state interest." *City of Cleburne, Texas vs. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (emphasis added). Unlike the cases cited in Miller's petition, this action does not involve statutes or local ordinances which delineate government action based on a classification system.[14] Also, unlike the

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[14] *City of Cleburne, Texas vs. Cleburne Living Center, supra* (a case involving the validity of zoning ordinance classifications based on mental retardation); *Heller vs. Doe*, ___ U.S. ___, 113 S.Ct. 2637 (1993) (a case involving Kentucky statutory provision allowing for the commitment of different groups based on different criteria); *Evans et al. vs. Romer*, 82 P.2d 1335 (Colo. 1994) (a

cases cited by Miller, this case does not involve government agents or government entities such as the United States Department of Defense taking actions based on government regulations and classifications.[15] All that is involved here is the private termination without any court involvement of an individual's private employment; as such those actions were not based on any sort of statutory government classifications and are not subject to a rational basis review.

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case involving a state constitutional amendment providing that sexual orientation could not provide the basis for protective class status); *Equality Foundation vs. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) (a case challenging the constitutionality of a city charter amendment which prohibited the city from providing preferential treatment based on homosexual orientation); *Gregory vs. Ashcroft*, 501 U.S. 452 (1991) (concerning constitutionality of a Missouri statute that required judges to retire at 70). *United States Department of Agriculture vs. Monroe et al*, 413 U.S. 528 (1973) (a case involving enforcement of an amendment to the Food Stamp Act which rendered ineligible any household containing an individual unrelated to any other member of the household. The Court after reviewing the legislative history determined that the amendment was intended to prevent hippies and hippie communese from participating in the food stamp program and that the challenged statutory classification was clearly irrelevant to the Act's stated purpose. *Id.* at 534, 535.)

[15] *Anderson vs. Branen*, 799 F.Supp. 490 (S.D. N.Y. 1992) (a case involving the actions of three special agents of the United States Drug Enforcement Administration which the court found to be federal government action). *Able et al. vs United States*, 880 F.Supp. 961 (E.D. N.Y. 1995) (appeal docketed No. 95-6111) (2nd Cir. May 24, 1995) (concerned application of Defense Department regulations to military personnel). See other Defense Department cases referenced in Footnote 12.

The trial court's involvement in this matter consisted solely of enforcement of the non-compete clause which was not imposed upon Miller "for being gay". The motivation for the non-compete clause was to protect DeMuth's business if Miller left the firm for any of a number of reasons.[16] The non-compete clause was enforced by the trial court for the same reason that any contractual provision is enforced by any court. Miller breached the terms of the agreement when he failed to comply with the liquidated damages provision assessing damages based on the number of DeMuth's clients he misappropriated.[17]

Miller in his petition cites a whole series of cases which have absolutely no factual or legal connection to this action. Miller does this not only as a device to create the illusion of confusion but also in an attempt to mischaracterize the lower court's decisions as contradicting this Court's precedents. The Pennsylvania Superior Court and the Pennsylvania Supreme Court, after correctly applying this Court's decisions, which actually relate to the situation presented here, found that the trial court's enforcement of the contract, even if considered state action in the constitutional sense, did not violate the

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[16] The terms of the agreement allowed Miller to be terminated for a wide variety of non-performance reasons completely unrelated to his sexual preference.

[17] Miller argued for the first time to the Pennsylvania Superior Court that the liquidated damages provision was a penalty. The Pennsylvania Superior Court unanimously rejected this argument. Miller did not pursue this issue in his appeal to the Pennsylvania Supreme Court. See *Petitioner's Appendix Pages 12a-13a.*

Equal Protection Clause of the United States Constitution. The courts below applied the law as it exists correctly. For that reason Miller's Petition for Writ of Certiorari should be denied.

CONCLUSION

The issues which Miller now seeks to have the Court review were never presented to the trial court. The trial court's enforcement of the non-compete clause does not constitute state action in the constitutional sense. The Pennsylvania Superior Court and the Pennsylvania Supreme Court correctly applied the law as it exists and held that nothing occurred here to violate the equal protection clause of the United States Constitution.

The law is not what Miller and his counsel wish it were. Moreover, the law cannot be made the way Miller and his counsel want it to be by court enactment of legislation, which does not presently exist, through judicial opinion. The municipal governments in Cumberland County, Pennsylvania, the General Assembly of the Commonwealth of Pennsylvania, and the United States Congress have not enacted legislation which prohibits the enforcement of the contract entered into, voluntarily, by the parties. In the absence of such legislation, the courts below properly applied the law as it exists today, which is

not in any state of conflict or confusion. The Court need not review this matter further.

Respectfully submitted,

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